2013 WL 8697066 (Mass.App.Ct.) (Appellate Brief)
Appeals Court Of Massachusetts.

Anna BAROUNIS, Appellant/Cross-Appellee,
v.
Fotios BAROUNIS and Katherine Zosheraftain, Appellees/Cross-Appellants.

No. 2013-P-1270.
2013.

Consolidated Appeal from two will contests: Norfolk Probate and Family Court
Docket Nos. N009P-2372-EA and NO10P-0236-EA

Appellant's Reply Brief and Opposition To Cross-Appeal

Brian D. Bixby, BBO #044140, bbixby@burnslev.com, Susan E. Stenger, BBO #555552, sstenger@burnslev.com, Elizabeth G. Crowley, BBO #663470, ecrowley @burnslev.com, Burns & Levinson LLP, 125 Summer Street, Boston, MA 02110, 617-345-3739.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other:

***1** Statement of Issues Presented For Review

I. Whether the Trial Judge Properly Disallowed the 2004 Will Because Antonios Did Not Know Its Contents, Where The Drafting Attorney Got His Instructions From a Third Party and Never Met Antonios Before The Execution, and Where There Was Insufficient Evidence That The Estate Plan Was Sufficiently Explained to Antonios In Greek.

II. Whether the Trial Judge's Finding That The 2003 Will Was Not The Product Of Undue Influence Was Not Clearly Erroneous, Where The Disposition Was Not Unnatural, Anna's Influence Was Not Undue, and Antonios Had An Independent Greek-Speaking Attorney With Whom He Met Privately Regarding the 2003 Estate Plan.

III. Whether the 2003 Estate Plan, Which Was Properly Executed, And Of Which Antonios Knew the Contents, Should Be Allowed in Full.

***2** Stark differences exist in the circumstances of surrounding the 2003 and 2004 estate plans:

	2003 Estate Plan	**2004 Estate Plan**
Who located the drafting attorney?	At Antonios's request, Anna sought out a Greek-speaking lawyer (Pappas),then unknown to her. A.0779(11109-11.0780 (¶115), A.0781 (¶¶120-122); A.0782 (1129).	CPA Noukas referred Antonios to his referral source, Attorney Spino, (and not to the Greek-speaking attorney Noukas had gotten to prepare the 1998 plan. A.0773 (148), A.1062), A.1058-1059, A.1064-1065.
Lawyer's language?	Attorney Pappas speaks English and Greek. A.A.0781 (¶¶ 120-121).	Attorney Spino speaks only English. A. 1059. (CPA Noukas speaks English and Greek. A.1061.)
Did drafting attorney know of Antonios's previous estate plan?	Yes. Attorney Pappas had his 1998 estate plan. A. 0782 (¶129).	No. Attorney Spino did not know of the 2003 Will; CPA Noukas gave him a Copy of the 1998 estate plan. A.1059, A.1060-1061, A.1063-1066.
Did drafting attorney meet with Antonios before the execution meeting?	Yes, for 1.5 hours (nearly two months before signing). A.0782 (1131).	No. Attorney Spino met with Antonios only for the execution of the 2004 estate plan. A.1059, A.1065.
Who told drafting attorney Antonios‘s wishes?	Antonios. Tr.0615-0616; Tr.0699-0700. Anna never discussed her parents' estate plan wishes with Attorney Pappas. A.0779 (1110), A.0782 (1131).	Exclusively CPA Noukas. A.1059, A.1060, A.1066.
Who instructed drafting attorney to prepare estate plan?	Antonios. A.0783 (11132-133).	CPA Noukas. A.1059, A.1063, A.1064.
Did drafting attorney recall those instructions at trial?	Yes. Tr.0615-0616.	No. A.1059.
Did anyone other then Antonios discuss the documents with the drafting attorney?	No. Attorney Pappas and Anna never discussed the substance of the estate plan.[1] A.0782 (¶131), A. 0783 (¶134), A.0786 (¶155).	Yes. CPA Noukas. A.1059, A.1060, A.1066.
Was the drafting attorney aware Antonios owned Greek real estate?	Yes. A.0783 (11136-137), A. 0784 (1141).	No. A.1060.

Did anyone suggest any edits to the drafting attorney's draft estate plan?	No. Tr.0673.	Yes. Attorney Spino sent drafts to "someone" and "someone" sent them back bearing handwritten notes. A.1061. A.1068.
What was explained to Antonios at the execution meeting, and by whom?	In Greek, Attorney Pappas explained the effect of each of the 2003 estate planning documents to Antonios. A.0785 (11152-153); see also Tr.0620, Tr.0622, Tr.0637.	In English, Attorney Spino described the "highlights" of the 2004 plan. In Greek, CPA Noukas, without reviewing the lengthy documents, explained what he "assumed" they contained. A.1059-1060, A.1067.
Was any other business conducted at the execution meeting?	No. A. 0785, 11152-155.	Yes. The meeting occurred April 14th, just before tax day, and included the signing of income tax return extensions and discussion of gift tax returns. A.1060, A.1066-1067.
How long was the execution meeting?	1.5 hours. A.0785 (¶ 153).	About 40-45 minutes. A.1060.
Who witnessed Antonios's signature?	Someone working in Pappas's building, and a banker visiting the building, asked that same day. A.0786, ¶¶154, 157-162.	CPA Noukas and the original referral source for Attorney Spino. A.0789 (¶179), A.1066-1067.

***3** STATEAPPBRIEF 4Based ***5** on the foregoing factual differences and the following legal argument, this Court should affirm the disallowance of Antonios Barounis's 2004 will, and should affirm the allowance of his 2003 will, but vacating the portion of the judgment declaring a partial intestacy.

*6 Argument

I. The Judge's Disallowance of the 2004 Will Was Proper and Should Be Affirmed.

The proponent of a will bears the burden of proving that the testator knew the contents of the instrument that he signed and executed it with the intention that it operate as his will; the proponent is aided by a presumption that a person signing a written instrument knows its contents. *Duchesneau v. Jaskoviak*, 360 Mass. 730, 733 (1972) (citations omitted), *as cited in Paine v. Sullivan*, 79 Mass. App. Ct. 811, 817 (2011).

Anna did not, as Appellees contend, forfeit any right to challenge the 2004 estate plan by moving to dismiss Appellees' petition at the close of their case on the 2004 plan. The fact that the presumption that a competent testator knows the contents of the document he is signing is rebutted by the *proponent's own evidence* does not undercut the fact of the rebuttal. [2]

***7** Here, the judge properly disallowed the 2004 will, finding that the presumption that a competent testator understood the contents of his testamentary documents was rebutted by credible evidence that Antonios "*did not know and was unfairly advised of the contents of the [2004] Will and Trust.*" A. 0628 (emphasis added).

The issue here was not whether Antonios was of sound mind or sufficient intelligence, but whether the documents were adequately explained to him in a language he understood. The judge found that Antonios blindly followed the guidance of CPA Noukas and executed the 2004 will and trust at Noukas's direction, *specifically finding that CPA Noukas and Antonios each were unaware of the contents of the 2004 will and trust.* [3] Without reviewing the 60-80 pages of documents, CPA Noukas

explained to Antonios in Greek what he *assumed* they contained. A. 1067. CPA Noukas did not ***8** explain several technical concepts to Antonios, because he *presumed* Antonios "understood money." A.1067.

The crux of the issue is not, as Appellees suggest, Attorney Spino's failure to follow estate planning best practice, but rather the judge's specific findings that Antonios and CPA Noukas, who purportedly explained the documents to Antonios in Greek, did not know the contents of the 2004 estate plan. Attorney Spino *could* not explain the 2004 plan to Antonios in Greek, and the Greek-speaking CPA Noukas *did* not do so.

Appellees are incorrect in stating that the presumption that a testator knew the contents of what he was signing can only be rebutted through "proof of fraud, undue influence, or want of testamentary capacity attending the execution of the will." (Opp. Brief, P. 27. Appellees cite *Lipphard v. Humphrey*, 209 U.S. 264, 270 (1908) as "cited with approval in" *Richardson v. Richards*, 226 Mass. 240, 245 (1917)). In Richardson, however, the Supreme Judicial Court merely cited *Lipphard* for the proposition that the presumption a person signing a written instrument knows its contents applies to wills.

Not knowing the contents of a will due to a language barrier is sufficient to overcome the ***9** presumption. In *Dobija v. Hopey*, the Supreme Judicial Court reversed the probate court's judgment disallowing the will, holding that the evidence did not sustain the judge's finding that a language barrier or lack of communication rendered the will ineffective. *Dobija v. Hopey*, 353 Mass. 600, 603 (1968). This was not as a matter of law, but rather based on the weight of the evidence: the will was simple and there was ample testimony that the deceased understood the provisions of the instrument and that these provisions reflected her intentions. Thus, it is possible for a will to be invalid under Massachusetts law where the testator's language barrier prevents him from knowing the contents of the document he signs. [4]

Appellees rely extensively on citations to the trial transcript, failing to address the court's ***10** contrary findings. [5] The judge was free to disregard any testimony of Attorney Spino or CPA Noukas that he did not find credible.

As the judge found, Attorney Spino's only source of information for Antonios's supposed wishes was CPA Noukas; Antonios could not read the documents written in English; and the documents were not explained to Antonios in Greek. Antonios did not know the contents of the 2004 estate plan.

***11 II. The Trial Judge's Finding That The 2003 Will Was Not The Product Of Undue Influence Was Not Clearly Erroneous.**

Not all influence is undue. [6] The judge here concluded:

[I]n this case, when one, as decedent with Anna, consistently over a number of years accedes to someone's wishes, coupled with sorrow, fatherly affection, and intuitive and visceral analysis of the children's comparative wealth albeit somewhat skewed through Anna's hyperbole, the Court cannot conclude that Anna's imposed influence was undue. [A.0807]

"[U]ndue influence involves some form of compulsion which coerces a person into doing something he does not want to do." *Heinrich v. Silvernail*, 23 Mass. App. Ct. 218, 223 (1986). Fotios and Katherine, as the contestants, failed to meet their burden of proving all the elements of undue influence, that:
(1) an unnatural disposition has been made;

(2) by a person susceptible to undue influence to the advantage of someone;

(3) with an opportunity to exercise undue influence; and

(4) who in fact has used that opportunity to procure the contested disposition through improper means.

Hernon v. Hernon, 74 Mass. App. Ct. 492 (2009).

***12** The judge here found that the disposition to Anna was not unnatural. A.0807.[7] In *O'Rourke v. Hunter*, 446 Mass. 814, 828 (2006), the Supreme Judicial Court held that a "judge's conclusion of no unnatural disposition disposes of the claim of undue influence." Nonetheless, the other elements are addressed as follows.

Suspicion, no matter how strong, will not warrant a finding of undue influence. "There must be a solid foundation of established facts upon which to rest an inference of its existence." *Heinrich*, 23 Mass. App. Ct. 218, 223 (1986) (citing *Neill v. Bracket*, 234 Mass. 367, 370 (1920)).

> ***13** This proposition applies with peculiar force when the result of drawing such an inference is to destroy the effect of a written instrument prepared with deliberation and signed and attested with all the formalities required by law for the execution of a will.

Neill v. Bracket, 234 Mass. 367, 370 (1920).

There must be sufficient proof of the causation requirement - i.e., that the beneficiary *in fact exerted* improper influence resulting in the procurement of a will. *Heinrich*, 23 Mass. App. Ct. 218, 224 (1986). The influence must be exerted so as to destroy the decedent's free agency. *Heinrich*, 23 Mass. App. Ct. 218, 227 (1986).

Mere opportunity for undue influence is insufficient. *Burns v. Dunn*, 340 Mass. 526, 528 (1960). The judge's finding that Anna and Antonios's trip to Greece in October 2003 represented her "opportunity" to "convince" Antonios to give her the market, and that she "convinced" Antonios that she was the poorest of his three children (A.0782 (¶127)) does not support a finding of undue influence. First, an "opportunity" is not sufficient to prove undue influence. Second, it really was not an "opportunity," because Antonios had already told Attorney Pappas his wishes at their private September meeting; Attorney ***14** Pappas drafted the estate plan based on their conversation at that September meeting, and there was no evidence that the drafts were revised prior to Antonios's November signing. A.0782 (¶¶131-133); A.0784 (¶¶42-143); Tr.0615-0616; Tr.0673. Third, Anna did not need to "convince" her father that she was the poorest of the three children; he already knew that fact, including that Fotios and Katherine were successful business owners who owned large suburban homes. A.0768 (¶5); A.0770 (129); A.0772 (1139-40); A.0781 (¶125); A.0798 (¶252).

Here, Attorney Pappas provided Antonios real independent legal representation in the drafting and execution of his 2003 estate plan. Although Anna located Attorney Pappas and drove her parents to their appointments with him, the following findings all weigh against any suggestion that Antonios was overpowered by Anna or that he became subservient to her wishes: Attorney Pappas was not previously known to Anna; it was Antonios who told Attorney Pappas his wishes; Attorney Pappas met alone with Antonios and his wife for an hour and a half on two occasions (one preliminary meeting and the execution meeting); and Attorney Pappas never discussed the substance of the ***15** documents with Anna.[8] *O'Rourke*, 446 Mass. 814, 828-829 & n.25 (2006).[9]

There are no findings supporting Fotios and Katherine's contention (Opp. Brief, p. 45) that Antonios grew powerless as he grew old, against Anna's allegedly **exploiting** their relationship for **financial** gain. A.0807. The judge found that, in 2003, Antonios was mentally sharp and in good physical condition. A.0779 (¶109). Anna did not isolate her father from her siblings. Fotios and Katherine had as much access ***16** to Antonio as Anna did. *O'Rourke*, 446 Mass. 814, 829 (2006); A.0812. The judge specifically found:

> That Anna manipulated, cajoled and tugged on heart strings does not create a preponderance of undue influence. [...] Anna took decedent to the trough but he was willing to drink early and often, consistently

> and ultimately besotted by affection for and fidelity to his then unaccomplished daughter, who measured short in comparison to her successful siblings. Such a disposition, though quantitatively superior for Anna, is neither unnatural nor blameworthy. [A.0807].

All influence is not undue influence. The trial judge's finding that the 2003 estate plan was not the product of undue influence was not clearly erroneous and should stand.

III. The 2003 Estate Plan Should Be Allowed In Full.

Appellees' sparse response to Anna's principal brief cannot overcome the judge's key finding which requires complete allowance of the 2003 Estate Plan:

> When Attorney Pappas had his next and last face to face about the 2003 estate plan with decedent and spouse on November 21, 2003 in his office, he reviewed the 2003 estate planning documents, explaining their effect. Decedent and spouse expressed approval, decedent by way of nod. All discussion with decedent was in Greek language. Pappas did not do a verbatim translation but rather an explanation of the effect of each document ***17** at the end of which they indicated the documents expressed their wishes. Pappas understood decedent and decedent appeared to understand him. Decedent was then neatly dressed, very cordial and quite alert.

A.0785, ¶152. [10]

Appellees mischaracterize (Opp. Brief, pp. 10, 36) the judge's finding at A.0784 (¶144). Appellees state that, at the initial meeting with Attorney Pappas, “Antonios was only focused on giving the Market to Anna.” The finding in fact reads: “decedent who was focused on giving the store specifically and only to Anna.” The actual finding does not preclude Antonios's focusing on other issues as well. Indeed, in reference to Antonios's inquiry about when Mr. Chung's lease would expire, Appellees' counsel asked Attorney Pappas on cross-examination:
That's because Antonios and Lambrini, what they told you in your office was that they wanted to take back the Athens Market business and give it to their daughter?

Attorney Pappas: Yeah, that was one of their wishes, that they wanted their daughter to re-establish the family business that the parent had at 532 Tremont Street.

Tr.0679-0680 (emphasis added).

***18** At the time of the September 2003 meeting and the November 21, 2003, execution of the 2003 Will and Trust, Antonios did not own an ongoing business to pass on to Anna, as he had closed the market in 1996 when moving to Greece and leased out the commercial space. Mr. Chung was the lessee of the market space from 1996, when Antonios and Lambrini retired to Greece, until 2006. A.0773 (150), A.0774 (156), A.0776 (183), A.0791 (11199,202)). Thus, it is nonsensical to suggest that Antonios wanted to leave Anna only “the market” in his estate plan, because there was no ongoing business operation in 2003.

In 2003, Antonios and Lambrini clearly wanted new wills and intended to pass all their assets. They provided their 1998 plans to Attorney Pappas, stating they were not what they wanted. In 2003, they signed reciprocal estate plans leaving everything to each other, or, if the other predeceased, then to Anna.

The judge's focus on whether the term “residue” ***19** was explained to Antonios is in error. [11] A testator is only required to understand the effect of his will as a whole; it is not necessary that he grasp the meaning of technical legal terms. *Dunham v. Holmes*, 225 Mass. 68, 72 (1916). [12] Most estate planning attorneys do not use terms of art in explaining documents to their clients; rather, they use plain terms such as: “and everything else goes to your daughter.”

An instrument such as a will, when executed as prescribed by law, is not lightly to be set aside. *Dobija*, 353 Mass. 600, 603 (1968); *Duchesneau*, 360 Mass. 730, 733 (1972) (citations omitted), *as cited in Paine*, 79 Mass. App. Ct. 811, 817 (2011).

The 2003 estate plan should be allowed in full.

*20 Conclusion and Requested Relief

For the foregoing reasons, and those stated in Appellant's principal brief, this Honorable Court should:
1. Affirm the allowance of the 2003 Will, but vacate the portion of the Judgment (A.0764) after the word “ALLOWED” (except leaving the last sentence which reaffirms the previous disallowance of the 2004 Will), such that Anna is the sole devisee and beneficiary under the 2003 Will and Trust.

2. Alternatively, if this Court allows a partial intestacy, Anna should receive the market and the entire property at 532 Tremont Street (and then her intestate share of the remaining assets).

Footnotes

1 Appellees' statement (Opp. Brief, p. 8) that “On September 18, 2003, Anna discussed reviewing her parents' estate plan with Attorney Pappas (citing A.0782 at 1 129)” overstates the findings. The Court in fact found: “It was unclear to the Court whether Anna told Pappas her parents had asked for a review or a revision of the estate plans [A.0782, 1129] ... Anna never discussed the documents nor her parents' estate plan wishes with him. [A.0782, 1131].”

2 Appellants' contention (Opp. Brief, p.27) that it had to be Anna who presented the rebuttal evidence is nonsensical and is not required by the authorities they cite. For example, Comment g to § 3.1 of the *Restatement of Property (Wills and Other Donatives Transfers*) merely states: “The presumption is rebuttable only by clear and convincing evidence.”

3 Attorney Spino prepared the estate planning documents for decedent exclusively based on instructions and information he received from CPA Noukas. Attorney Spino recalled that the CPA spoke Greek during the signing ceremony. Attorney Spino does not speak or understand the Greek language. Attorney Spino recalls that there was an exchange between the CPA and decedent, but not at Spino's direction. A.1059.

4 Likewise, in *Samson v. Laragia*, 90 A. 28, 29 (Conn., 1914) cited by Appellees, although the will at issue was allowed, the court acknowledged the contestant had the opportunity to present evidence that the testator's language barrier prevented him from expressing his wishes or understanding the content of the will as drafted, from which a jury *could have* found the will invalid.

5 For example, Appellees state (Opp. Brief, p. 32): “There is no doubt that Antonios spoke and understood some English, as he had operated a store in the South End for many years and freely conversed with his primary care physician” (Citing A.0387 at ¶7; A.1056 at 1 2; Tr. 0190:24-191:2). That is not accurate. The actual cited testimony of Antonios's doctor at Tr.1090-1091 is: “*And you were able to confer freely with him, subject to limits of language?” to which the doctor replied “I was.”* The judge's findings were: “Decedent had minimal ability to read English. “Decedent's proficiency in English language was conversational; he did not write English, other than his signature.” A.0768 (¶1).

6 *E.g.*, *Heinrich v. Silvernail*, 23 Mass. App. Ct. 218, 226 (1986) (“The power of influence held by one friend over another will not defeat the will. Such influence is a simple and expected consequence of human friendship and, in this case, compassion.”).

7 *See Heinrich*, 23 Mass. App. Ct. 218, 223 (1986) (leaving property to close friend rather than brother does not render disposition unnatural); *O‘Rourke v. Hunter*, 446 Mass. 814, 828 (2006) (testatrix's leaving vastly different amounts among three children, and nothing to two other children, was not inherently unnatural disposition). Moreover, a dramatic turnabout in the disposition of assets in successive estate plans is not necessarily a sign of an unnatural disposition, as Appellees suggest. *See Erb v. Lee*, 13 Mass. App. Ct. 120, 126 (1982) (can sometimes support a finding of undue influence, such as here where **elderly**, infirm decedent's last will

favored a domineering housekeeper who had harassed the decedent for money, including with frightening late night phone calls, and returned to her employ after being fired for such behavior).

8 Appellees' suggestion that "virtually all of Attorney Pappas' communications were with Anna, whom he viewed as his 'communicant with her parents' is hyperbolic and misleading. Attorney Pappas met with Antonios and Lambrini privately for 1.5 hours on September 25, 2003, during which he ascertained their wishes, and he met with them privately for 1.5 hours on November 21, 2003, when they executed their 2003 estate plans. A.0780 (¶112); A.0782 (¶131); A.0783 (¶¶132-133); A.0784 (¶¶142-143); A.0785 (11152-153); See also Tr.0615-0616; Tr.0620; Tr.0622; Tr.0637. Although Anna had a few phone calls with Attorney Pappas between those two lengthy private meetings, there is no evidence that they were about anything more than logistics or questions about Mr. Chung's lease. Tr.0670; Tr.0672-0673.

9 *Cf. In re Moretti,* 69 Mass. App. Ct. 642, 644, 654 (2007) (undue influence existed where beneficiary, inter alia, fired the testator's first attorney when he raised objections to the beneficiary's involvement in the estate planning, hired a second attorney who met privately with the beneficiary regarding the testator's will and who represented the beneficiary at the same time, and the beneficiary marked up draft wills with changes he wanted the testator to make).

10 Attorney Pappas had no motive to testify untruthfully as Appellees suggest (Opp. Brief, p. 47) and the judge made no findings questioning his truthfulness or credibility.

11 With respect to the 2003 plan, the judge concluded that: "the term residue, as used in the 1998 document schedule of beneficiaries, was not explained to decedent who was focused on giving the store specifically and only to Anna. Pappas never reviewed the 1998 Will with decedent nor the meaning of any such use of the word "residue" therein." A.0784.

12 *See also Goddard v. Dupree,* 322 Mass. 247 (1948) (testamentary capacity requires a testator's ability to understand and carry in mind "in a general way" the nature and situation of his property),

End of Document